BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

Docket No. 2004-178-E

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| In re: | ) | |
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| South Carolina Electric & Gas | ) | |
| Company—Application for | ) | **PROPOSED FINDINGS OF** |
| Adjustments in the Company's | ) | **FACT AND CONCLUSIONS OF LAW** |
| Electric Rate Schedules and Tariffs | ) | **OF COLUMBIA ENERGY LLC** |
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Columbia Energy LLC ("Columbia Energy") submits the following findings of fact and conclusions of law to address certain issues which Columbia Energy has raised in this proceeding. Columbia Energy has not attempted to prepare a comprehensive order addressing all issues which the Commission must decide in this case. Instead Columbia Energy submits findings and conclusions relating to the issues of: (1) whether SCE&G should be allowed to recover from ratepayers the remaining costs of the Jasper facility and; (2) whether this Commission should open a rule-making proceeding to establish an RFP process to govern the acquisition of additional capacity by jurisdictional utilities.

## I. INTRODUCTION.

In this proceeding SCE&G seeks the approval of this Commission to place into its rate base the remaining portion of the costs of the Jasper generating facility which is approximately 42% of the total cost of that facility which is $506 million. Tr. p.612. In its last rate case SCE&G obtained approval to recover 58% of those costs. In this proceeding SCE&G asks that the remaining $229 million of Jasper costs be allowed into

the rate base. Tr. p.153. In addition to those costs SCE&G seeks the approval of the Commission to have ratepayers pay all costs of operating the Jasper facility. Tr. p. 154.

The impact of these rulings which SCE&G seeks is best illustrated by a review of one adjustment proposed by SCE&G witness Walker. In her pre-filed testimony Ms. Walker described Adjustment No. 3 as decreasing "…test year expenses by $2,041,667 related to short term contracts for the purchase of capacity during the test year. These capacity purchases enabled the Company to maintain adequate reserve margins during the test year, but this capacity is no longer necessary now that the Jasper County Generating Station has begun commercial operation." Tr. p.691. On cross examination Ms. Walker elaborated on this adjustment.

> Q. Would I be correct that the $2 million that you're proposing to eliminate is the amount that the company had purchased during the test year, specifically for the purpose of maintaining adequate reserve margins?
> A. I think that's accurate.
> *Q.* Okay. *Would it be correct, then, that the Company, during the test year, was required to spend a little over $2 million to maintain the adequate reserve margins and will no longer need to do that because the Company is bringing on line a $500 million generating plant?*
> *A. That's correct.*

Tr. p. 766. (emphasis supplied). By this proposed adjustment SCE&G acknowledges that it is asking this Commission to allow it to saddle its ratepayers with the obligation to pay for a $500 million facility for the purpose of maintaining capacity reserves when those ratepayers spent $2 million for the purpose of maintaining those reserves in the test year.

This is an astounding discrepancy. It raises a red flag concerning both whether the remaining portion of the Jasper facility is used and useful and whether SCE&G's

planning process should be more closely overseen by this Commission in the form of an RFP process.

Further confirming the fact that there are problems which require closer supervision by this Commission is the record relating to SCE&G's characterization of its sales to the North Carolina Cooperatives. In its 2004 Integrated Resource Plan SCE&G has clearly treated those sales as firm sales of capacity unavailable to serve its native load customers – *even in 2009 through 2011 when it plans to add capacity to serve its native load.* Although SCE&G at the hearing in this matter attempted to contradict its IRP, Columbia Energy submits that it should not be allowed to do so. As shown below in its proposed findings of fact and conclusions of law, Columbia Energy believes the IRP as well as the full record demonstrate that the remaining portion of the Jasper facility costs are not used and useful to SCE&G ratepayers. That record also clearly demonstrates the need for a vigorous RFP process**.**

## II. PROPOSED FINDINGS OF FACT

After carefully considering the evidence, including the testimony and exhibits presented in this docket, the Commission makes the following findings of fact:

1. In this proceeding SCE&G seeks to include in its rate base $229 million in costs associated with the completion of its Jasper generating plant. Tr. p.153. That figure represents approximately 42% of the total costs of the Jasper facility. Tr. p.154.

2. The Jasper facility has a capacity of 875 megawatts (MW). Tr. p.156. This addition of capacity gives SCE&G more generating capacity than it needs to serve its native load. Tr. p.1614.

3. In planning the size of its Jasper facility SCE&G entered into a contract with a group of electric cooperatives located in North Carolina, North Carolina Electric Membership Corp. That contract was a sale of 250 MW of capacity. Hearing Ex. 5; Tr. p.159. But for that contract SCE&G would not have built the facility at 875 MW. Tr. p.156. Subsequently the company entered another contract with the North Carolina Electric Membership Corporation to sell an additional 100 MW. Tr. p.159.

4. Hearing Exhibit 3 is SCE&G's 2004 Integrated Resource Plan ("IRP"). Tr. p.157. SCE&G is required by S.C. Code Section 58-33-430 (1976) to file this document with this Commission. This Commission is entitled to rely on the representations made in this report.

5. As it is required by statute, SCE&G reported to this Commission on its available generating capacity and the expected demands on its system in its 2004 IRP. On page 9 of the IRP SCE&G presents a spreadsheet showing its forecasts of loads and resources through the year 2018. Hearing Ex. 3. In line 4 of the spreadsheet SCE&G lists its capacity sales to the North Carolina cooperatives. Tr. p.159. In the IRP those sales are characterized as "Firm Contract Sales."

6. The 2004 IRP spreadsheet also reports on SCE&G's reserve margin. Its reserve margin for 2004 is 19.8%. Hearing Ex.3, p.9; Tr. p.158. That margin was described at the hearing on its application by SCE&G president Neville Lorick as "…the amount of electricity that you have beyond what you see your peak is going to be so you can meet that peak should you have problems, lose a unit or have equipment problems." Tr. p.158. In its calculation of its reserve margins SCE&G treated the 350 MW sales to the North Carolina cooperatives as unavailable to serve native load.

7. Hearing Exhibit 4 is SCE&G's response to Columbia Energy's Interrogatory 2-2. That document confirms that SCE&G considers the generating capacity which it sold to the North Carolina cooperatives as unavailable to serve its captive South Carolina ratepayers. It shows that SCE&G's reserve margin would be 29.1% in 2004 but for the sales to the North Carolina cooperatives.

8. The 2004 IRP also demonstrates another important aspect of SCE&G's planning process. The 250 MW sale to the North Carolina cooperatives extends through the year 2012. Hearing Ex.3. In 2009 SCE&G shows that it will need an additional 150 MW to serve its "gross territorial peak." The IRP however shows that SCE&G does not plan to serve that additional demand from South Carolina by recalling the capacity promised to North Carolina. Additional growth in territorial demand is shown for the years 2010 through 2012 but the Company does not plan to meet that demand by curtailing its sales to the North Carolina cooperatives. These plans are consistent with the characterization of the contracts as "Firm Contract Sales" in the IRP.

9. This Commission accepts SCE&G's calculation of its reserve margins as shown in its 2004 IRP. The forecast, which is consistent with the pre-filed testimony of Mr. Lorick, shows that the company has an adequate reserve margin. The Commission also accepts the characterization of the sales of capacity to the North Carolina cooperatives. Those sales are firm sales which have not been considered by SCE&G as available to serve its native load. This Commission likewise finds that the 350 MW of capacity which has been sold to the North Carolina cooperatives is unavailable to serve SCE&G's native load and is therefore not used and useful to South Carolina ratepayers.

10. The two sales to the North Carolina cooperatives are sales for resale and are therefore wholesale sales. See Hearing Ex. 5. Tr. p.1618.

11. Since it first planned the construction of the Jasper generating plant, SCE&G has considered the sales to the North Carolina cooperatives as an integral part of its plan to build that plant larger than necessary to serve its native load. Mr. Lorick testified that the Jasper facility would not have been built at 875 MW but for the 250 MW sale. Tr. p.875. Kevin Marsh, the company's Chief Financial Officer, also testified that the plant would not have been built at its present size but for these off-system sales. Tr. p.1614.

12. While SCE&G has stated that revenues from the North Carolina sales will offset the additional costs of the Jasper facility (Tr. p.1574), it has not seriously challenged the testimony of Columbia Energy witness Dr. David Dismukes on the subject. Dr. Dismukes testified that by his calculations revenues from the North Carolina contracts would fail to meet the additional costs of the Jasper facility by approximately $16.3 million in the test year and a total of $55.2 million over three years. Tr. pp.1071-1072.

13. In response to the testimony of Dr. Dismukes, SCE&G presented the testimony of Dr. Joseph Lynch, its Manager of Resource Planning. Dr. Lynch presented testimony that the company's plan to build a 875 MW facility saved ratepayers money over a 20 year planning horizon. Tr. p.1570. However, Dr. Lynch's analysis was based on the assumption that if the company had not built the Jasper facility at its present size it would have been forced to build another facility as early as 2007. Tr. p.1572.

This analysis ignores the possibility that the company could have more efficiently and more cheaply met its needs by entering into long term contracts for the purchase of capacity. The record in this case discloses a substantial basis for believing that such alternatives would produce better results for ratepayers. Most glaring is the demonstrable fact that in the test year SCE&G was able to meet its needs for capacity sufficient to maintain an adequate reserve margin by spending just over $2 million. Tr. p.766. Also relevant is the fact that the group of North Carolina electric cooperatives was able to reliably meet its capacity needs by utilizing an RFP process which produced the contract with SCE&G and others. Tr. pp.162-163. In addition, Dr. Dismukes presented testimony and exhibits demonstrating that there is substantial merchant capacity available in the southeastern United States. Tr. pp.1092-1095. For these reasons this Commission finds that the analysis offered by SCE&G is unpersuasive. Instead this Commission is persuaded by the testimony of Dr. Dismukes that the additional cost of building the Jasper facility larger than necessary was more expensive for South Carolina ratepayers.

14. As reflected in the above findings, this Commission is convinced that South Carolina ratepayers will benefit from a fair and healthy wholesale market for electricity. Dr. Dismukes explained that the promotion of fair wholesale markets is an additional reason not to allow SCE&G to place in its rate base capacity that is not needed to serve native load customers. Tr. pp.1085-1086. If SCE&G is allowed to recover in rates the additional 42% of Jasper costs when the capacity represented by those costs is not needed by the ratepayers, then it will have a potentially unfair advantage in the competitive wholesale market. Tr. p.1086. That unfair advantage will in

the long run be harmful to South Carolina ratepayers by inhibiting the development of healthy wholesale markets.

## III. CONCLUSIONS OF LAW.

Based upon the foregoing findings of fact, the Commission concludes, as a matter of law, the following:

### A. Applicable Statutes and Regulations

1. The Commission has jurisdiction over this matter pursuant to S.C. Code Ann. § 58-3-140(A).

2. S.C. Code Ann. § 58-27-820 requires every electrical utility to file with the Commission schedules showing all rates, service rules and regulations within the jurisdiction of the Commission.

3. The Commission held a public hearing concerning the lawfulness and reasonableness of the proposed changes in SCE&G's rates as required by S.C. Code § 58-27-870. The Commission concludes that it is not reasonable to allow SCE&G to recover the additional 42% of the costs of the Jasper generating facility by increasing its rates.

### B. Estoppel

4. The Commission concludes that SCE&G should be estopped from denying that its sales of 350 MW of capacity to the North Carolina Cooperatives make

that capacity unavailable to serve its South Carolina ratepayers. The statements made by SCE&G in its 2004 IRP concerning those sales are binding on the company.

5. South Carolina recognizes estoppel by record which precludes a party from denying the truth of matters set forth in a record, whether judicial or legislative. *Watson v. Goldsmith*, 205 S.C. 215, 31 S.E.2d 317, 319 (1944). Estoppel by record is similar to estoppel by deed which precludes a party from denying the truth of any material fact asserted in a deed. *Hipps v Hipps*, 288 S.C. 564, 343 S.E.2d 669 (Ct. App. 1986); *Evins v. Richland County Historic Preservation Commission*, 341 S.C. 15, 532 S.E.2d 876 (Sup. Ct. 2000). *See also Stoney v. McNeile*, 12 S.C.L. 85, 1 McCord 85, 1821 WL 694 (S.C. Const. App. 1821).

South Carolina has also adopted the doctrine of judicial estoppel as it relates to matters of fact. The doctrine provides that when a party has formally asserted a certain version of the facts, the party cannot later change those facts when the initial version no longer suits him. *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472, 477 (Sup. Ct. 1997); *Quinn v. Sharon Corp.*, 343 S.C. 411, 540 S.E.2d 474, 475-476 (Ct. App. 2001); *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 577 S.E.2d 202 (Sup. Ct. 2003).

6. The Utility Facility Siting and Environmental Protection Act, S.C. Code Ann. § 58-33-10 *et seq.,* requires each public utility to file an annual report with the Commission which contains a ten year forecast of loads and resources. The report must list the major utility facilities that will be required to supply system demands during the forecast period. S.C. Code Ann. § 58-33-430.

7. SCE&G presented testimony during the hearing which characterized the sales to the North Carolina cooperatives as non-firm, opportunity sales. This testimony contradicts SCE&G's 2004 IRP in which the same sales were characterized as "firm contract sales." As discussed above in Findings of Fact 5 through 9, the 2004 IRP treated the 350 MW as being unavailable to serve South Carolina ratepayers. In particular the IRP shows that SCE&G plans to acquire additional reserves in 2009 to serve its "territorial load" and that it does not plan to recall any of the capacity sold to the North Carolina Cooperatives. We conclude that since the testimony during the hearing indicating that the sales are not firm sales contradicts SCE&G's earlier representation that the contracts are firm, off-system sales, the doctrine of estoppel should be applied and the 350 MW of capacity should be treated as unavailable to serve native load customers.

**C. Used and Useful**

8. The Commission concludes that the remaining 42% of the costs of Jasper facility should not be included in SCE&G's rate base because these costs are not "used and useful" as a matter of law to the ratepayers of South Carolina.

9. The "rate base" is the amount of investment on which a regulated public utility is entitled to earn a fair and reasonable return. A public utility's "rate base" represents the total investment in, or the fair market value of, the used and useful property which it necessarily devotes to rendering the regulated services. *Hamm v. SC Public Service Com'n*, 298 S.C. 309, 380 S.E.2d 428, 429 fn. 1 (Sup. Ct. 1989) *citing Southern Bell Tel. & Tel. v. Public Service Com'n*, 270 S.C. 590, 244 S.E.2d 278 (1978).

*See also*, *Hamm v. Public Service Com'n*, 294 S.C. 320, 364 S.E.2d 455 (Sup. Ct. 1988).

10. The Commission holds that the current rate payers should bear only legitimate costs of providing service to them. Since SCE&G has sold 350 MW of excess capacity to North Carolina cooperatives to serve non-native loads, its property associated with that capacity – represented by the remaining 42% of Jasper costs - is not used and useful in providing service to the South Carolina public and should not be included in the rate base.

Other jurisdictions have decided in similar circumstances that excess capacity costs should not included in the rate base. *In re: Otter Tail Power Co.*, 44 PUR 4th 219 (N.D. PSC 1981) (Exhibit 1) and *In re: Northern States Power Co.*, 32 PUR 4th 58 (MN PSC 1979) (Exhibit 2). In *the Northern States case* the primary issue was whether the company's entire investment in a natural gas facility was used and useful such that its cost should be wholly included in rate base. The question arose because the utility built excess capacity into the facility and entered into off-system contracts to sell capacity associated with the facility. The utility argued that the off-system sales were adequately compensating it for the excess capacity and that the correct regulatory treatment was to put all costs of the facility in rate base and credit all revenues from the off-system sales to the utility's regulated revenues. The Minnesota Public Service Commission rejected this argument even though it recognized that the utility's decision to build the facility had been a prudent decision:

> The prudence of the decision to build the plant is simply not dispositive. Likewise, the fact that the contracts for the excess capacity may well be reasonably compensatory is not grounds for inclusion. The contracts are

> outside the Commission's jurisdiction. The fact remains that the capacity is not presently serving the public, and the public is therefore not to be burdened with paying a return on plant not useful to them.

*Re Northern States Power Co.,* 32 P.U.R.4th at 72 (Exhibit 2). This decision is indistinguishable from the circumstances presented concerning the excess capacity associated with SCE&G's Jasper facility. The fact that the decision to build the facility was determined to be prudent at the time it was planned does not predetermine whether it will be found to be used and useful in this proceeding. The fact that SCE&G has entered into contracts beyond the jurisdiction of this Commission to sell the capacity likewise provides no basis for the regulatory treatment sought by SCE&G. The excess capacity is not used and useful to SCE&G ratepayers.

SCE&G has contended that by issuing the Jasper facility's siting certificate, the Commission has already approved the full costs of Jasper facility. In its testimony SCE&G alleges that a determination of whether the Jasper facility is "used and useful" was determined by the proceeding under the Siting Act and that the Commission is now precluded from making that determination at this time. S.C. Code § 58-33-10 *et seq.* This contention is incorrect. Proceedings under the Siting Act address the projected need of the proposed facility and its potential impacts across a wide range of perspectives. S.C. Code § 58-33-160. There is no discussion in the Siting Act about the impact of a proposed facility on utility rates and the Act does not require that funds spent on facilities will automatically be included in the utility's rate base. That issue—whether the investment is used and useful—is before the Commission for determination at this time to determine whether the remaining 42% of the costs of the Jasper facility should be placed into the rate base. We find that there is no provision in the Siting Act

that binds future Commissions for ratemaking purposes and conclude that the remaining 42% of the costs of the Jasper facility should not be included in the rate base.

### D. Wholesale Contracts

11. The North Carolina Electric Membership Corporation contracts to purchase 350 MW of excess capacity are wholesale contracts not subject to the jurisdiction of the Commission.

12. Since the North Carolina contracts provide for the transmission of electricity as sales for resale, the contracts are federally regulated by the Federal Energy Regulatory Commission. 16 U.S.C.A. 824 *et seq.*

13. SCE&G presented testimony during the hearing which contended that the 350 MW contracts are "opportunity sales." We conclude that the North Carolina Electric Membership Corporation contracts are firm contracts and not opportunity sales. Coordination services or opportunity sales do not cause a utility to plan or construct new capacity. The services are offered only when existing capacity constructed to meet native load is temporarily available. *Florida Power & Light Co.*, 33 FERC P 61,116, 61,248 (Issued 10/31/85) (Exhibit 3).

14. The record in this case contradicts SCE&G's contention that the sales to the North Carolina cooperatives are opportunity sales. Mr. Lorick testified that the Jasper facility was built larger than necessary to serve its native load due to these contracts. In addition, in the 2004 IRP SCE&G indicates that it will need an additional 150 MW to serve its "gross territorial peak" in 2009 while its North Carolina contracts

extend to 2012. The company does not plan to serve that demand by recalling the capacity sold to the North Carolina cooperatives.

15. The Commission concludes that these sales to North Carolina cooperatives are not sales of temporary excess power in the form of opportunity sales since SCE&G constructed additional capacity at Jasper which allowed the company to make the off-system sale to the North Carolina cooperatives. Therefore, the Commission concludes it should remove for retail ratemaking purposes the costs of the additional capacity to serve the North Carolina contracts and the revenues associated with these contracts.

### E. Establishment of RFP Process

16. The Commission concludes that the ratepayers would benefit from a fair and reasonable wholesale market for electricity. As indicated during the hearing, in the test year SCE&G was able to maintain its capacity reserves by purchasing capacity for $2 million on the wholesale market. The Commission is persuaded by the testimony of Dr. Dismukes that the establishment of an RFP or competitive bidding process would, in the future help ensure that plans for the addition of capacity will be made in a manner that best serves the needs and interests of ratepayers. It is the Commission's responsibility to ensure that regulated electric utilities do not make capital investments at the rate payers' expense when alternative, less expensive methods are available to meet the utilities' needs. The Commission finds that it would be in the public interest to initiate a rulemaking proceeding within 30 days of the issuance of this order to establish

rules that would require all jurisdictional utilities to enter into a competitive bidding process prior to acquiring new generation resources.

Respectfully submitted this _____ day of December, 2004.

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